NOV 17 2000

Record No. 99-1848

In The Supreme Court of the United States

BUCKHANNON BOARD AND CARE HOME, INC.;
THE WEST VIRGINIA RESIDENTIAL
BOARD AND CARE HOME ASSOCIATION;
and on behalf of all others similarly situated,

Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND
HUMAN RESOURCES, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Buckhannon Board and Care Home, Inc., the Residential Board and Care Association, Dorsey Pierce, and a group of similarly situated homes and residents filed a civil action under the Fair Housing Amendments Act of 1988 (FHAA), 42 U.S.C. §§ 3601, *et seq.* and Titles II and III of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12132 and 12182, challenging the Defendants' self-preservation rules. The West Virginia Legislature repealed the self-preservation rules, mooting the case. Plaintiffs requested attorney's fees under the catalyst theory. The district court denied the request because of the United States Court of Appeals for the Fourth Circuit's *en banc* decision in *S-1 and S-2 v. State Board of Education*, 21 F.3d 49, 51 (4th Cir.)(en banc), *cert.denied*, 513 U.S. 876 (1994).

The question presented is:

Whether the Fourth Circuit erred in its interpretation of *Farrar v. Hobby*, 506 U.S. 103 (1992), in *S-1 and S-2*, in concluding that the catalyst theory is no longer available for civil rights plaintiffs to recover attorney's fees.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the following are now parties in this matter: Joan E. Ohl, Secretary, West Virginia Department of Health and Human Resources; Office of Health Facility Licensure and Certification; John Wilkenson, Director, Office of Health Facility Licensure and Certification; Sandra L. Daubman, Program Manager, Office of Health Facility Licensure and Certification; West Virginia Office of the State Fire Marshal, Sterling Lewis, Jr., Fire Marshal; Cecil Underwood, in his official capacity as Governor of the State of West Virginia; State of West Virginia; West Virginia State Fire Commission; John Beaty, II, Commissioner; Joseph J. Bostar, III, Commissioner; John S. Bailey, II, Commissioner; Charles L. Eversole, Commissioner; Francis A. Guffey, II, Commissioner; Wayne A. Lewis, Commissioner; James L. Oldaker, Commissioner; David L. Tolliver, Commissioner; Chuck Nunyon, Commissioner; Bill L. Spencer, Commissioner; Victor Stallard, Jr., Commissioner; J. D. Waggoner, Commissioner; and, Kenneth Morgan, Commissioner.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Background facts 2

B. The underlying fire safety issue 4

C. Procedural developments in the underlying lawsuit 6

D. The Motion for Attorney's Fees 9

SUMMARY OF THE ARGUMENT 12

ARGUMENT 13

I. CIVIL RIGHTS PLAINTIFFS THAT ARE PREVAILING PARTIES ARE ENTITLED TO THEIR ATTORNEY'S FEES. 13

A. Congress intended private enforcement of civil rights laws. 13

B. Prevailing parties are entitled to attorney's fees under federal fee shifting statutes. 16

C. Prevailing parties under the ADA and FHAA are entitled to attorney's fees. 19

II. ATTORNEY'S FEES MAY BE AWARDED UNDER THE CATALYST THEORY IN CIVIL RIGHTS CASES. 21

A. The Eighth Circuit originated the catalyst theory thirty years ago. 21

B. Congress incorporated the catalyst theory into the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988. 23

C. This Court has recognized that Congress intended to allow the catalyst theory under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988. 25

D. This Court's decision in *Farrar* does not address the catalyst theory. 28

III. COURTS OF APPEALS HAVE CONTINUED TO APPLY THE CATALYST THEORY IN CIVIL RIGHTS CASES 31

A. Courts of Appeals have uniformly followed the catalyst theory for over thirty years. 31

B. The Fourth Circuit erroneously determined that it could no longer consider the catalyst theory after *Farrar*. 32

C. All other Courts of Appeals have continued to follow the catalyst theory after *Farrar*. ... 35

IV. THE PLAINTIFFS IN THIS CASE ARE ENTITLED TO A REMAND SO THAT THE DISTRICT COURT CAN CONSIDER THEIR REQUEST FOR ATTORNEY'S FEES UNDER THE CATALYST THEORY. . . 40

A. This Court should apply the *Nadeau* test in allowing awards of attorney's fees under the catalyst theory 40

B. Plaintiffs Are Entitled to a Remand 43

CONCLUSION 46

TABLE OF AUTHORITIES

FEDERAL CASES

Albemarle Paper Company v. Moody,
422 U.S. 405 (1975) 14

Aleyska Pipeline Service Company v. Wilderness Society, 421 U.S. 240 (1975) 15

American Council of the Blind v. Romer,
992 F.2d 249 (10th Cir.),
cert. denied, 510 U.S. 864 (1993) 36

Baumgartner v. Harrisburg Housing Authority,
21 F.3d 541 (3d Cir. 1994) 34,36,37

Beard v. Teska, 31 F.3d 942 (10th Cir. 1994) 37

Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979) 31

Brown v. Gaston County Dyeing Machine Co.,
457 F.2d 1377 (4th Cir.) *cert denied*,
409 U.S. 982 (1972) 24

Brown v. Local 58, International Brotherhood of Electrical Workers, 76 F.3d 762
(6th Cir. 1996) 37

Christiansburg Garment Co. v. E.E.O.C.,
434 U.S. 412 (1978) 31

City of Riverside v. Rivera, 477 U.S. 561 (1986) 16

Citizens Against Tax Waste v. Westerville City School, 985 F.2d 255 (6th Cir. 1993) 33

Citizens Coalition for Block Grant Compliance, Inc. v. City of Euclid, 717 F.2d 964 (6th Cir. 1983) 31

Craig v. Gregg County, Texas,
988 F.2d 18 (5th Cir. 1993) 33,36

Cullens v. Georgia Department of Transportation,
29 F.3d 1489 (11th Cir. 1994) 36

Doty v. County of Lassen, 37 F.3d 540 (9th Cir. 1994) 41,42

Farrar v. Hobby, 506 U.S. 103 (1992) ..... *passim*

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,
528 U.S. 167, 120 S.Ct. 693 (2000) 29, 36, 43

Gurule v. Wilson, 635 F.2d 782 (10th Cir. 1980) 32

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987) 27

Hanrahan v. Hampton, 446 U.S. 754 (1980) (*per curiam*) 18,25,26,31,32,34

Hensley v. Eckerhart, 461 U.S. 424 (1983) ..... *passim*

Hewitt v. Helms, 482 U.S. 755 (1987) ..... *passim*

Institutionalized Juveniles v. Secretary of Public Welfare, 758 F.2d 897 (3d Cir. 1985) 44

Kentucky v. Graham, 473 U.S. 159 (1985) 32

Kilgour v. City of Pasadena,
53 F.3d 1007 (9th Cir. 1995) 36,37

Long v. Bonnes, 455 U.S. 961 (1982) 31,40

Little Rock School District v. Special School District 1, 17 F.3d 260, (8th Cir. 1994) 36

Maduka v. Meissner, 114 F.3d 1240
(D.C. Cir. 1997)(*per curiam*) 36

Maher v. Gagne, 448 U.S. 122 (1980) ..... *passim*

Marbley v. Bane, 57 F.3d 224
(2nd Cir. 1995) 35,37,38

Marek v. Chesney, 473 U.S. 1 (1985) 13

Morris v. City of West Palm Beach,
194 F.3d 1203 (11th Cir. 1999) 38,41

N.A.A.C.P. v. Wilmington Medical Center, Inc.,
689 F.2d 1161 (3rd Cir. 1982) 31

Nadeau v. Helgemoe, 581 F.2d 275
(1st Cir. 1978) 31,34,35,40,41

Newman v. Piggie Park Enterprises, Inc.,
390 U.S. 400 (1968) (per curiam) 13,14

*Northcross v. Board of Education of Memphis
City Schools*, 412 U.S. 427 (1973) 20

*Owner-Operator Independent Drivers
Association, Inc. v. Bissell*,
210 F.3d 595 (6th Cir. 2000) 41,45

Oxford House-A v. City of University City,
87 F.3d 1022 (8th Cir. 1996) 21

Parham v. Southwestern Bell Telephone Co.,
433 F.2d 421 (8th Cir. 1970) 21-24

*Paris v. United States Dept. of Housing
& Urban Development*, 988 F.2d 236
(1st Cir. 1993) 21,33,44

*Payne v. Board of Education, Cleveland
City Schools*, 88 F.3d 392 (6th Cir. 1996) 36

*Pottgen v. Missouri State High School
Activities Association*, 103 F.3d 720
(8th Cir. 1997) 21

Rhodes v. Stewart, 488 U.S. 1 (1988)
(*per curiam*) 17

*Roe v. Cheyenne Mountain Conference
Resort, Inc.*, 124 F.3d 1221
(10th Cir. 1997) 21

Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983) 20

*Sablan v. Department of Finance, of the
Commonwealth of the Northern
Mariana Islands*, 856 F.2d 1317
(9th Cir. 1988) 32

State of New Hampshire v. Adams,
159 F.3d 680 (1st Cir. 1998) 35

S-1 and S-2 v. State Board of Education,
21 F.3d 49 (4th Cir.)(en banc), *cert. denied*, 513 U.S. 876 (1994) ..... *passim*

S-1 and S-2 v. State Board of Education,
6 F.3d 160 (4th Cir. 1993) 32

Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782 (1989) 16,18,27,31

Williams v. Hanover Housing Authority,
113 F.3d 1294 (1st. Cir. 1997) 40

Zinn by Blankenship v. Shalala, 35 F.3d 273
(7th Cir. 1994) 36,37

FEDERAL STATUTES

Federal Fair Housing Amendments Act of 1988 (FHAA),
42 U.S.C. §§ 3601, *et seq.* i,1

42 U.S. §§ 3612(c)(1) 19

42 U.S.C. § 3612(c)(2) 1,19, 21

The Americans with Disabilities Act of 1990,
42 U.S.C. §§ 12132, 12182 ..... i,1

42 U.S.C. § 12133 19

42 U.S.C. § 12205 ..... 1,19, 21

Title VII of the Civil Rights Act of 1964
42 U.S.C. §§ 2000e, *et seq.* 21

42 U.S.C. §§ 2000e-5(k) 22

Title II of the Civil Rights Act of 1964
42 U.S.C. §§ 2000a-3b 14

Civil Rights Attorney's Fees Awards Act of 1976
42 U.S.C. § 1988 ..... *passim*

Supreme Court Case Selections Act
28 U.S.C. § 1254(1) 1

Clean Water Act
33 U.S.C. §§ 1251, *et seq.* 27

STATE STATUTES

W. Va. Code § 16-5C-2(f) 2

W. Va. Code § 16-5C-12 4

W. Va. Code §§ 16-5H-1, *et seq.* 8

W. Va. Code §16-5H-2(f) (later 16-5H-2(j)) 2

W. Va. Code §§ 29A-3-1, *et seq.* 8

W. Va. Code §§ 29A-3-11 and 12 8

STATE REGULATIONS

C.S.R. §§ 64-65-3, 3.14 (later C.S.R.
64-65-3, 3.36) 2

State Fire Code, C.S.R. §§ 87-1-1,*et seq.* 8

C.S.R. §§ 87-1-14, 14.7 2

LEGISLATIVE HISTORY

H.R. Rep. No. 1558, 94th Cong.,
2d Sess. (1976) 15,18,23,27

S. Rep. No. 1011, 94th Cong.,
2d Sess. (1976) 15,18,23,26,27,34

H.R. Rep. No. 711, 100th Cong.,
2d Sess. (1988) 19,20

H.R. Rep. No. 485(II), 101st Cong.
2d Sess. (1990) 20

H.R. Rep. No. 485 (III), 101st Cong.,
2d Sess. (1990) 20

MISCELLANEOUS

Vol. 2, M. Schwartz & J. Kirlin, Section
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Attorney's Fees, (3rd. ed. 1997) 31,41

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit is dated January 20, 2000, Petitioners' Appendix ("Pet. App.") at A4. The unreported opinion of Chief Judge Frederick P. Stamp, Jr., United States District Court for the Northern District of West Virginia is dated January 29, 1999. Pet. App. A9.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered judgment on January 20, 2000. A Petition for Rehearing and Petition for Rehearing *En Banc* was denied February 15, 2000.Pet. App. A1. The Petition for a Writ of Certiorari was filed on May 15, 2000. The Petition was granted on September 26, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This civil action arises under the FHAA, 42 U.S.C. §§ 3601, *et seq.*, and Titles II and III of the ADA, 42 U.S.C. §§ 12132 and 12182. The FHAA provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs." 42 U.S.C. § 3613(c)(2). Pet. App. A21. The ADA similarly provides that a "court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee." 42 U.S.C. § 12205. Pet. App. A24.

STATEMENT OF THE CASE

A. Background facts.

On October 18, 1996, Sandra Daubman, Program Manager for the Office of Health Facility Licensure and Certification (OHFLAC), issued three Cease and Desist Orders forcing petitioner Buckhannon Board and Care Home (BBCH) to close its residential care homes within thirty days for want of compliance with the state's self-preservation rules. The orders banned BBCH, in its last thirty days of operation, from accepting new residents and commanded BBCH to expel Dorsey Pierce and all other residents. (JA 46-55).

BBCH provides residents with a home-like environment, more comfortable than living in an institutional setting such as a nursing home. (Stipulation Exhibit 1, 11/15/96 Tr. at 113). The residents at BBCH do not need any special care such as nursing care, and they pay for their own care. (*Id.* at p. 111). It is undisputed that, at the time the Cease and Desist Orders were issued, BBCH complied with all OHFLAC rules and the State Fire Code, except the self-preservation rules. (*Id.* at 53, 115-16). The self-preservation rules required all persons residing in a residential care home to have the ability, without assistance, to evacuate their homes in the event of an imminent danger such as a fire. W. Va. Code §§ 16-5C-2(f), 16-5H-2(f) (later 16-5H-2(j)); C.S.R. 64-65-3, 3.14 (later C.S.R. 64-65-3, 3.36); C.S.R. 87-1-14, 14.7.

In 1996, BBCH had three residents who were not capable of self-preservation, including Plaintiff Dorsey Pierce (*Id.* at 124). At that time, Ms. Pierce was an alert woman of 102 years who had lived for four years at BBCH in Buckhannon, West Virginia. (*Id.* at 69).[1] The home was four short blocks from her daughter's home and Ms. Pierce's son-in-law, Robert C. Marple, testified that he was very happy with the excellent care his mother-in-law received at BBCH and that it would be traumatic for her to be forced to move. (*Id.* at 70-71). The Cease and Desist Orders were designed to force Ms. Pierce and others to leave BBCH because they could not evacuate the homes without assistance.

On October 28, 1996, BBCH, the Residential Board and Care Association, Dorsey Pierce, and a group of similarly situated homes and residents filed a law suit against the Defendants, including the State of West Virginia, two state agencies, and eighteen individuals. The Plaintiffs' Complaint and Amended Complaint challenged the Cease and Desist Orders and the self-preservation rules as contrary to the FHAA and Titles II and III of the ADA. (JA 22,67).

On November 1, 1996, a hearing on Plaintiffs' Motion for a Temporary Restraining Order was held before Chief

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[1] Ms. Pierce continued to live at BBCH until the age of 105, when she died on January 3, 1999. The parties have stipulated to the dismissal of the writ of certiorari only as to Ms. Pierce, since she was mistakenly designated a party in the Petition.

Judge Frederick P. Stamp, Jr. for the Northern District of West Virginia. At the hearing, the parties stipulated to the entry of an Agreed Order staying the enforcement of the Cease and Desist Orders pending resolution of the validity of the self-preservation rules. (Docket No. 9, entered on November 7, 1996).[2]

B. The underlying fire safety issue.

The case before the District Court pitted the concept of "aging in place" in a residential care home setting against the fire safety concerns of the State. That issue was not unique to West Virginia. The debate started on a national level when the National Fire Protection Association (NFPA) developed its 1985 Life Safety Code, to address the fire safety needs of residential care homes. (Stipulation Exhibit 2, Ex. 2). The Plaintiffs retained the services of several national experts in fire safety for residential care homes, including Dr. Bernard Levin, a former government employee at the National Bureau of Standards. Dr. Levin, using his expertise in fire safety and psychology, had helped develop the nation's first flexible fire safety standards for residential care homes.

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[2] The Agreed Order initially provided for a stay of the Cease and Desist Orders "pending resolution of the administrative appeal available pursuant to W. Va. Code § 16-5C-12." *Id.* As Chief Judge Stamp's February 19, 1998, order denying the Motion to Dismiss recognized, the stay continued after that because the administrative opinion was appealed to circuit court and that matter was then stayed pending the District Court's final decision. (JA 119).

Dr. Levin testified that, when he started his work twenty years earlier, all states had self-preservation requirements for residential care homes. (Stipulation Exhibit 6, Levin depo. at p. 62). It was his goal in developing new provisions on residential care homes to avoid any reference to the concept of self-preservation because:

> We were trying to avoid requiring people to be in an institutional-like setting with its costs and other deficits just because somebody could not be certified as capable of self-preservation, a term which had no definition. (*Id.*).

To achieve this goal, he proposed a flexible approach to fire safety that looked to several factors at residential care homes, not just the ability of a resident to evacuate the premises without assistance. (*Id.* at 41). To achieve this goal, he placed all facilities into three categories for evacuation capability as prompt, slow, and impractical. Once a facility and its residents were evaluated under these three approaches, the fire safety parameters for that facility could be devised on an individualized basis.

Dr. Levin's proposals for residential care homes were ultimately accepted in the 1985 NFPA Life Safety Code. Dr. Levin went on to testify that, after he left the government, he performed a survey for the National Institute of Standards and Technology. His survey determined that a majority of states had abandoned the concept of self-preservation for residential

care homes, and adopted the flexible approach he created in the 1985 NFPA Life Safety Code. (*Id.* at 64).

State Fire Marshal Smittle testified in his March 11, 1997, deposition that he had been philosophically opposed to the NFPA Life Safety Code provisions pertaining to residential care homes since 1985 and he had voted against them when they were promulgated by the NFPA. (Stipulation Exhibit 5, Smittle depo. at pp.23-28). He thought the rules pertaining to self-preservation were essential in a small rural state like West Virginia (*Id.*). And, based on this view, in the intervening eleven years, he had personally ensured, through his position as State Fire Marshal, that West Virginia's self-preservation rules were retained. This occurred even though both the State Fire Code and the NFPA Life Safety Code were updated on a triennial basis.

C. Procedural developments in the underlying lawsuit.

Between State Fire Marshal Smittle's deposition in March, 1997, and January, 1998, the parties completed discovery and submitted a voluminous stipulated record of six notebooks of transcripts and exhibits to the District Court, along with cross-motions for summary judgment. On February 19, 1998, the District Court denied the Defendants' Motions to Dismiss this lawsuit. The Defendants moved to dismiss on the merits, arguing that the Plaintiffs had failed to state a claim on which relief could be granted. In denying the motion, the

District Court held that the Plaintiffs had properly stated a claim for discrimination under the FHAA and a claim for discrimination under the ADA. (JA 102).

Sometime about February 24, 1998, it came to the attention of undersigned counsel that State Fire Marshal Smittle and the Fire Commission had initiated steps to repeal the self-preservation rules. (¶ 11, Affidavit of Counsel, JA 131). In particular, on April 30, 1997, State Fire Marshal Smittle advised the Fire Commission that he proposed amending the State Fire Code to be consistent with the newest version of the NFPA Life Safety Code. (Exhibit 1, Motion for Attorney's Fees, JA 126). This Fire Commission meeting occurred six weeks after his deposition. During that deposition, State Fire Marshal Smittle had opined that the NFPA Life Safety Code provisions related to residential care homes would not work in West Virginia.

On May 30, 1997, State Fire Marshal Smittle presented a revised State Fire Code to the Fire Commission, adopting for the first time the provisions of the NFPA Life Safety Code pertaining to residential care homes. (*Id.* at Exhibit 2). His proposal was a complete reversal from his long held opposition to these provisions. The proposed rules were placed on a fast track, because they were required to be filed with the Secretary of State's office and the Legislative Rule-Making Review

Committee by August 1, 1997, to be enacted in the West Virginia Legislature that year. (*Id.* at Exhibit 3).[3]

On or about February 24, 1998, undersigned counsel first learned of this development and advised counsel for the Defendants of the proposed new State Fire Code, of which he also had been unaware. (¶ 11, Affidavit of Counsel, JA 131). Thereafter, counsel for the Defendants further advised that OHFLAC had recently submitted a bill to the West Virginia Legislature to repeal its self-preservation provisions as well. (*Id.* at ¶ 12). Defendants then filed a Motion to Stay. (*See* Docket No. 63). On March 14, 1998, the West Virginia Legislature enacted the two bills repealing the self-preservation provisions challenged by the Plaintiffs.[4] Following the repeal, the Defendants moved to dismiss the Plaintiffs' lawsuit as moot. (*See* Docket Nos. 69 and 70).

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[3] An administrative agency in West Virginia has no independent legal authority to promulgate rules. Pursuant to W. Va. Code §§ 29A-3-1, *et seq.*, an agency may promulgate proposed rules, but they do not become final rules until they are approved by the Legislative Rule-Making Review Committee and enacted by the Legislature. W. Va. Code §§ 29A-3-11 and 12. Although the Legislature may amend the rules, particularly to clean up any mistakes, the vast majority of the rules proposed by agencies are approved with little discussion or amendment.

[4] The West Virginia Legislature enacted House Bill 4200, related to amendments to the State Fire Code, C.S.R. §§ 87-1-1, *et seq.* and Senate Bill 627, related to the self-preservation provisions in W.Va. Code §§ 16-5H-1, *et seq.* (JA 123).

D. The Motion for Attorney's Fees.

On June 4, 1998, Plaintiffs moved for an award of attorney's fees on grounds that they had prevailed in their lawsuit and obtained the exact relief sought - elimination of the self-preservation rules. Believing their challenge led to the abolition of the rules, Plaintiffs applied for reasonable attorney's fees under the catalyst theory. The foundation for the request lay in the fact that there was a material change in the relationship between the parties. At the beginning of the lawsuit, the Defendants sought the closure of BBCH and the eviction of Ms. Pierce and all other residents. (JA 46-55). In the end, the Plaintiffs obtained all the relief that they sought in the first instance. BBCH never closed. Dorsey Pierce and other residents were never evicted from BBCH. And most significantly, no other elderly residents in West Virginia now fear that they could be ordered out of their homes as a result of these abandoned rules.

The Plaintiffs argued before the district court that, based on the chronology of events in this case, there was a causal connection between their suit and the Defendants' efforts to abolish the self-preservation rules. Plaintiffs highlighted that State Fire Marshal Smittle had long been philosophically opposed to the provisions of the NFPA Life Safety Code related to residential care homes. Smittle and the other Defendants had therefore vigorously fought the litigation every

step of the way. No Defendant ever gave any indication of a willingness to settle or withdraw the self-preservation rules.[5]

Plaintiffs argued that Defendant Fire Marshal Smittle's decision to amend the rules to delete the self-preservation requirement at the May 30, 1997, State Fire Commission meeting was no mere coincidence. Likewise, the decision of OHFLAC to introduce Senate Bill 627 on February 20, 1998, after the district court held on February 19, 1998, that the complaint stated a claim under the FHAA and the ADA was motivated by the Plaintiffs' lawsuit. The Plaintiffs' lawsuit and persuasive expert discovery convinced the Defendants that the self-preservation rules were based on outmoded stereotypes of disabled persons and violated federal law. Thus, Plaintiffs established that their suit against the Defendants catalyzed repeal of the self-preservation rules.

On January 29, 1999, Chief Judge Stamp dismissed the Plaintiffs' lawsuit as moot and denied the fee request. The court explained that the "'catalyst theory' deems a plaintiff to have prevailed when he or she obtains some portion of the relief originally sought through a defendant's voluntary conduct, even though no formal judgment in his or her favor has been rendered. *Were this argument viable, plaintiffs might prevail on this theory.*" (Pet. App. A17)(emphasis added).

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[5] As undersigned counsel has attested, an attempt was made to settle this matter at State Fire Marshal Smittle's deposition and it was soundly rebuffed. Thereafter, no further negotiations were attempted. (¶ 10, Affidavit of Counsel, JA 131).

However, the district court denied the fee request on the ground that the Fourth Circuit had rejected the catalyst theory in *S-1 and S-2*.

The District Court nevertheless ordered the parties, *sua sponte,* to brief the issue of sanctions under Rule 11, Federal Rules of Civil Procedure, as a result of the bad faith conduct of the State Fire Marshall's Office in allowing the parties to continue to litigate once the decision had been made to amend the self-preservation rules. (Pet. App. A19).[6]

The Fourth Circuit affirmed the district court's order on the basis of its prior *en banc* decision in *S-1 and S-2* that an attorney's fees award could not be made under the catalyst theory.

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[6] Chief Judge Stamp also rejected the Plaintiffs' argument for attorney's fees under the "bad faith exception" concluding that, despite Plaintiffs "very strong argument," the conduct did not "quite rise, or sink" to the level of bad faith required to warrant an award under that exception. (Pet. App. A19). With regard to Rule 11, on April 22, 1999, sanctions were imposed upon the State Fire Marshall's office in the amount of $3,252.00. In so holding, the District Court stated (JA 147):

> This Court finds that as a state agency and an officer of a state agency, defendants should have been aware of the nature of this litigation. Further, because the "self-preservation" requirement was the root of this case, that defendants could not have known that its deletion would affect this litigation is doubtful, at best.

The amount of the fine related to the cost of briefing the Rule 11 issue, not the case as a whole.

SUMMARY OF ARGUMENT

This case presents the question whether a civil rights plaintiff, whose lawsuit catalyzes a defendant into making changes consistent with the relief requested, is a prevailing party, even though the action is dismissed as moot. For over thirty years, federal courts have awarded attorney's fees to civil rights plaintiffs under the catalyst theory. They have considered the party to have prevailed if there was a material alteration of the legal relationship between the parties that was caused by the lawsuit and the lawsuit was not frivolous, unreasonable, or groundless.

The Fourth Circuit in *S-1 and S-2 v. State Board of Education*, 21 F.3d 49, 51 (4th Cir.)(en banc), *cert. denied*, 513 U.S. 876 (1994), held that this Court's decision in *Farrar v. Hobby*, 506 U.S. 103, 111 (1992), limited the term "prevailing party" to one who achieves a judgment, settlement, or consent order. On this basis, the Fourth Circuit concluded that an award of attorney's fees may not be made to a party under the catalyst theory. The district court followed *S-1 and S-2* in this case and refused to consider the Plaintiffs' request for attorney's fees.

Congress enacted fee shifting statutes to vindicate civil rights legislation. The catalyst theory is consistent with the term "prevailing party" as used in the attorney's fee provisions of the ADA and FHAA and it was specifically endorsed by Congress when it enacted the Civil Rights Attorney's Fees Act

of 1976, 42 U.S.C. § 1988. The catalyst theory is further consistent with this Court's prior decisions regarding the term "prevailing party" which hold that a plaintiff need not litigate a case to judgment to obtain fees if the plaintiff achieves a portion of what she sought in the lawsuit. E.g. *Maher v. Gagne*, 448 U.S. 122 (1980); *Hewitt v. Helms*, 482 U.S. 755 (1987). This Court should now reverse the Fourth Circuit's ruling in this case and remand this case to the district court for consideration of the Plaintiffs' request for attorney's fees under the catalyst theory.

ARGUMENT

I. CIVIL RIGHTS PLAINTIFFS THAT ARE PREVAILING PARTIES ARE ENTITLED TO THEIR ATTORNEY'S FEES.

A. Congress intended private enforcement of civil rights laws.

Congress has enacted a variety of civil rights laws intending that enforcement of those laws would depend, in part, on "private attorneys general."[7] In *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) (per curiam), this Court

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[7] Congress has enacted over 100 federal fee shifting statutes that allow an attorney's fee award to be made to a prevailing party. *See Marek v. Chesney*, 473 U.S. 1, 43-51 (1985)(appendix to dissenting opinion of Brennan, J.).

recognized that, absent special circumstances, attorney's fees should be awarded to a prevailing party in actions under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b). The Court stated (*Id.* at 401-402):

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. * * * If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees - not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II. [footnotes omitted].

This Court extended its attorney's fee ruling in *Newman* to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), in *Albemarle Paper Company v. Moody*, 422 U.S. 405, 415 (1975).

Thereafter, this Court further examined the issue of attorney's fees for private attorneys general in *Aleyska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975). In that decision, this Court held that no common law authority existed to award attorney's fees to private attorneys general or any other litigant absent express legislation by Congress (*Id.* at 263). This Court's decision in *Aleyska Pipeline* quickly led to Congress enacting the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. This Act provided for an award of attorney's fees in additional enumerated civil rights cases.

The House and Senate Reports accompanying the Act demonstrate continued congressional encouragement of enforcement of a variety of civil rights laws by private attorneys general. The House Judiciary Committee emphasized this point by stating "[t]he effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens." H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976). The Committee explained that private citizens can correct injustices by resorting to court and by receiving a "judicial remedy [that] is full and complete," including attorney's fees. *Id.* The Senate Judiciary Committee also recognized this point stating (S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976)):

> The purpose and effect of S. 2278 are simple - it is designed to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since

> 1866. * * * All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

This Court acknowledged this legislative history at length in *City of Riverside v. Rivera*, 477 U.S. 561 (1986), and rejected any proportionality test that could limit a fee award to the size of the plaintiff's damage award. This Court further recognized that Congress encouraged private parties to enforce civil rights laws because both the litigant and the public as a whole are vindicated every time the law is enforced.

B. Prevailing parties are entitled to attorney's fees under federal fee shifting statutes.

The first step this Court takes in determining whether an award of attorney's fees is appropriate in any civil rights case is to examine whether the party "crossed the 'statutory threshold' of prevailing party status." *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 789 (1989). This Court has further explained that this is a "generous formulation" and that, if the plaintiff succeeds "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit" then he is a

prevailing party. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).[8]

This Court has outlined the contours of prevailing party status in a variety of contexts, concluding that each of the following are prevailing parties: a party who achieves only a nominal award of damages, *Farrar v. Hobby*, 506 U.S. 103 (1992); a party who prevailed upon some but not all of his claims, *Hensley, supra,* and *Garland, supra*; and, a party that achieves a favorable settlement. *Maher v. Gagne*, 448 U.S. 122 (1980). Alternatively, this Court has concluded that the following are not prevailing parties: a party whose case becomes moot for reasons unrelated to the pending litigation and who obtained no relief, *Hewitt v. Helms*, 482 U.S. 755 (1987), and *Rhodes v. Stewart*, 488 U.S. 1 (1988)(*per curiam*);

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[8] In *Hensley, supra,* this Court concluded that there is "no precise rule or formula" for making fee determinations when the plaintiff achieved only limited success on the asserted claims for relief. 461 U.S. at 436. This Court explained (*Id.* at 433):

> A plaintiff must be a 'prevailing party' to recover an attorney's fee under § 1988. The standard for making this threshold determination has been framed in various ways. A typical formulation is that 'plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.' *Nadeau v. Helgemoe*, 581 F.2d 275, 278-279 (CA1 1978). This is a generous formulation that brings the plaintiff only across the statutory threshold. It remains for the district court to determine what fee is 'reasonable.' [footnotes omitted].

and, a party that obtained a reversal of a directed verdict against him and a remand for a new trial on appeal, but had not yet prevailed on the merits or obtained any actual relief, *Hanrahan v. Hampton*, 446 U.S. 754 (1980) (*per curiam*).

In reaching these decisions, this Court carefully examined the legislative history of § 1988 to determine what Congress meant by the term "prevailing party." In *Hanrahan, supra*, this Court reviewed that legislative history and quoted from H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 (1976) that "a person may in some circumstances be a 'prevailing party' without having obtained a favorable 'final judgment following a full trial on the merits.'" *Id.* at 756-57. This Court also relied on the Senate Report, citing S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976), which explained that "parties may be considered to have prevailed when they vindicate rights through a consent judgment *or without formally obtaining relief,*" (emphasis added). *Id.* at 757. Similar reasoning appears in *Garland, Hensley,* and *Maher, supra*.

This Court's cases addressing the term "prevailing party," have common elements - in order for a party to be considered prevailing, it must have achieved some relief and it must have benefitted from that relief. These elements exist when a case is settled. They similarly exist when a case is rendered moot as a result of the plaintiff catalyzing the defendant into making changes consistent with the relief requested by the plaintiff. In both instances, the plaintiff has

prevailed without "formally obtaining relief." In both cases the plaintiff is entitled to reasonable fees.

C. Prevailing parties under the ADA and FHAA are entitled to attorney's fees.

Both the ADA and the FHAA contain enforcement provisions allowing private citizens a full range of equitable relief, compensatory and punitive damages. 42 U.S. §§ 3612(c)(1) and 12133. These provisions compensate individuals harmed by unlawful discrimination and deter discrimination in the first place. *See, e.g.*, H.R. Rep. No. 711, 100th Cong., 2d Sess. 39-40 (1988) (FHAA lifted limit on punitive damages to provide incentives to bring private enforcement actions and to deter wrongful discrimination). Congress also enacted fee shifting provisions in both statutes. The FHAA provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs" 42 U.S.C. § 3612(c)(2), Pet. App. A21. The ADA provides that a "court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee." 42 U.S.C. § 12205, Pet. App. A24.

The legislative history of both Acts reveals that Congress intended these two provisions to be construed like other prevailing party statutes. In 1988, Congress amended the attorney's fee provisions of the Fair Housing Act, so that the "attorney's fee language in Title VIII [is] closer to the model

used in other civil rights laws," in particular, the Civil Rights Attorney's Fees Act, 42 U.S.C. § 1988. H.R. Rep. No. 711, 100th Cong., 2d Sess. 16 n.20, 17 (1988). Congress further recognized that the amendments were aimed at correcting a lack of enforcement because of "disadvantageous limitations on punitive damages and attorney's fees" in the then-current version of the Fair Housing Act. *Id.* at 16. Congress likewise indicated, in 1990, that it enacted the attorney's fee provisions of the ADA so "that the term 'prevailing party' [would] be interpreted consistently with other civil rights laws." H.R. Rep. No. 485 (II), 101st Cong. 2d Sess. 140 (1990). *See also* H.R. Rep. No. 485 (III), 101st Cong., 2d Sess. 73 (1990) (ADA's attorney's fee provision should be interpreted the same as 42 U.S.C. § 1988, including the interpretation of prevailing party).

Although this Court has not had occasion to consider the definition of a prevailing party under the ADA or the FHA, it has generally held that the term prevailing party is to be interpreted *pari passu* and read identically in all fee shifting statutes. *See e.g. Ruckelshaus v. Sierra Club*, 463 U.S. 680, 691-92 (1983); *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983); *Northcross v. Board of Education of Memphis City Schools*, 412 U.S. 427, 428 (1973). Therefore, this Court's decisions interpreting the term prevailing party under § 1988

should apply equally to that term under the FHAA and the ADA.[9]

II. ATTORNEY'S FEES MAY BE AWARDED UNDER THE CATALYST THEORY IN CIVIL RIGHTS CASES.

A. The Eighth Circuit originated the catalyst theory thirty years ago.

The catalyst theory has been accepted in the federal courts for awarding attorney's fees to prevailing parties in civil rights cases for over thirty years. It was first recognized by the Court of Appeals for the Eighth Circuit in *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970).

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[9] Several Courts of Appeals have considered how to interpret the term prevailing party under the FHAA and the ADA. They have uniformly concluded that the fee provisions are substantially similar to the attorney's fees provisions under Title VII, 42 U.S.C. §§ 2000e, *et seq.* and § 1988. *E.g., Paris v. United States Dept. of Housing & Urban Development*, 988 F.2d 236 (1st Cir. 1993) (application for attorney's fees arising under 42 U.S.C. § 3613(c)(2) and §1988 treated the same with regard to prevailing party analysis); *Pottgen v. Missouri State High School Activities Association*, 103 F.3d 720, 723 (8th Cir. 1997) (application for attorney's fees arising under 42 U.S.C. § 12205 is treated the same for prevailing party as a claim arising under §1988); *Oxford House-A v. City of University City*, 87 F.3d 1022, 1024 (8th Cir. 1996) (application for attorney's fees arising under 42 U.S.C. § 3613(c)(2) is treated the same for a prevailing party as a claim arising under Title VII or § 1988); *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1232 (10th Cir. 1997) (application for attorney's fees arising under 42 U.S.C. § 12205 is treated the same for a prevailing party as a claim arising under Title VII or § 1988).

Parham arose under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), in a case where the district court dismissed the complaint, without awarding the individual plaintiff any monetary judgment or the class any injunctive relief. The Court of Appeals upheld dismissal, but further held (*Id.* at 429-30):

> Although we find no injunction warranted here, we believe Parham's lawsuit acted as a *catalyst* which prompted the appellee to take action implementing its own fair employment policies and seeking compliance with the requirements of Title VII. In this sense, Parham performed a valuable public service in bringing this action. Having prevailed in his contentions of racial discrimination against blacks generally prior to February, 1967, Parham is entitled to reasonable attorney's fees, including services for this appeal, to be allowed by the district court as authorized by 42 U.S.C. § 2000e-5(k). [emphasis added].

In *Parham*, the Court of Appeals considered the plaintiff to have crossed the "statutory threshold" as a prevailing party, even though he did not obtain a judgment or a settlement, because he had acted as a catalyst in abating racial discrimination through his lawsuit. The Court determined that it was the plaintiff's lawsuit that catalyzed the employer to hire more African-Americans and therefore he was entitled to fees.

The Court further explained that the lawsuit benefitted the public and thus achieved the congressional goal of vindicating the Civil Rights Act of 1964.

B. Congress incorporated the catalyst theory into the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988.

The decision in *Parham* is also significant because it is relied upon and cited by both the House and Senate Reports in the enactment of the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988. Citation by both reports to *Parham* demonstrates express recognition by Congress that a prevailing party may be one who catalyzes a defendant into action. The Senate Report, No. 1011, 94th Cong., 2d Sess. at 5 (1976), states:

> for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. *Kopet v. Esquire Realty Co.* 523 F.2d 1005 (2d Cir. 1975), and cases cited therein; *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); * * *

The House Report, No. 1558, 94th Cong., 2d Sess. at 7 (1976), also states:

> Similarly, after a complaint is filed a defendant might voluntarily cease the unlawful practice. A court might still award fees even though it might conclude, as a matter of equity that no formal relief, such as an injunction, is needed. *E.g. Parham v. Southwestern Bell Telephone*, 433 F.2d 421 (8th Cir. 1970); *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir.) *cert denied*, 409 U.S. 982 (1972).
> * * *

In citing to *Parham* and *Brown*, Congress expressly recognized that one is a prevailing party when a lawsuit catalyzes a defendant into making changes consistent with the relief requested by the plaintiff, even though the lawsuit is dismissed as moot.[10] Rewarding litigants under the catalyst theory in such cases is consistent with the congressional goal of encouraging private enforcement of civil rights laws.

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[10] *Brown* is also a race discrimination case where the named plaintiff was not entitled to any final relief. Ultimately, the Court of Appeals held that the class was not entitled to relief because the employer had made great strides in hiring African-American employees after the lawsuit was filed. Despite no final relief for the class and the named plaintiff, the Fourth Circuit followed *Parham* and held an award of attorney's fees was appropriate. 457 F.2d at 1383.

C. This Court has recognized that Congress intended to allow the catalyst theory under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988.

Hewitt, Maher, and *Hanrahan, supra,* strongly support an award of attorney's fees under the catalyst theory. In *Hewitt, supra*, this Court reversed an award of attorney's fees to a plaintiff inmate who received no damages, injunctive relief, or declaratory judgment. However, it emphasized that (482 U.S. at 760-761):

> It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment - *e.g.*, a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor. See *Maher, supra*, 448 U.S., at 129.

The Court explained that the lower court's holding that the plaintiff's disciplinary proceeding was unconstitutional was insufficient because that finding had not *"affect[ed] the behavior of the defendant towards the plaintiff"* (emphasis in original). 482 U.S. at 761. In contrast, if "the defendant, under

the pressure of the lawsuit, pays over a money claim before the judicial judgment is pronounced" or "alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit," then "the plaintiff will have prevailed." *Id.* Ultimately, this Court stated in *Hewitt, supra*, that it would not limit the "outer boundaries" of the term prevailing party to preclude an award of attorney's fees under the catalyst theory. 482 U.S. at 759 and 763.[11]

This Court further recognized the catalyst theory in *Maher, supra*, when it held that a party who obtained a settlement would be considered a prevailing party under § 1988. The Court resolved the issue with little discussion, holding that "[t]he fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees." 488 U.S. at 129. The Court relied on Senate Report No. 1011, 94th Cong., 2d Sess. at 5 (1976), which said that fees are available when parties "vindicate rights through a consent judgment or without formally obtaining relief." *Id.*

Finally, in *Hanrahan, supra*, this Court reviewed the legislative history of § 1988 and explained that "a person may in some circumstances be a 'prevailing party' without having obtained a favorable 'final judgment following a full trial on the

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[11] This Court in *Hewitt* did not award attorney's fees to the plaintiff under the catalyst theory because he was no longer incarcerated. Therefore, he did not prevail, since he did not personally benefit from the change in regulations that may have resulted from his lawsuit. 482 U.S. at 763-764.

merits'" and "parties may be considered to have prevailed when they vindicate rights through a consent judgment *or without formally obtaining relief,*" *Id.* at 756-57 (emphasis added) (quoting H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 (1976), and citing S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976)).[12]

Prior to *Farrar v. Hobby*, 506 U.S. 103 (1992), this Court said it was "settled law" that a plaintiff has prevailed for purposes of attorney's fees when, in the absence of a court order or a settlement, a voluntary change in a defendant's conduct as a result of a lawsuit has redressed the plaintiff's grievances. *Hewitt,* 482 U.S. at 760-761. The Court identified the touchstone in a claim for attorney's fees as whether there had been a "material alteration in the legal relationship of the parties." *Garland*, 489 U.S. at 792-93. If a party achieved a favorable result from the lawsuit, it had crossed the "statutory

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[12] *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), provides additional support for this Court's recognition of the catalyst theory. In *Gwaltney,* this Court asked whether a civil action could be filed under the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, for wholly past violations. In holding that past violations were not actionable, this Court explained that plaintiffs should not be concerned that a case could later be mooted by a defendant's subsequent compliance with the Act because (*Id.* at 67, n.6):

> The legislative history of [33 U.S.C. § 1365(d)] states explicitly that the award of costs "should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions." S. Rep. No. 92-414, p. 81 (1971).

threshold" as a prevailing party, and was entitled to reasonable attorney's fees. *Hensley*, 461 U.S. at 431.

D. This Court's decision in *Farrar* does not address the catalyst theory.

In *Farrar*, this Court held that a civil rights plaintiff who obtains a judgment of nominal damages is a prevailing party. This Court also affirmed the decision of the Court of Appeals that it was unreasonable under the facts in that case for the plaintiffs to receive an award of attorney's fees, since they only obtained a nominal judgment. However, this Court did not address the situation of a case that became moot because the plaintiff's case catalyzed defendant's actions. Instead, it discussed the nature of the relief that a plaintiff must receive to be a prevailing party for attorney's fees purposes. The Court explained (506 U.S. at 111):

> Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. * * * Otherwise the judgment or settlement cannot be said to "affect the behavior of the defendant toward the plaintiff." [citation omitted].

The Court quoted *Hewitt* and *Maher* with approval. *Id.* So, nothing in *Farrar* limits the earlier discussion in those decisions. When, as here, a defendant modifies its behavior in response to a lawsuit, the lawsuit has "affected the behavior of

the defendant toward the plaintiff." Indeed, the Court has made clear that it is not a judgment itself that confers prevailing party status but a change in behavior by the defendant. In *Hewitt,* the Court stated that "[a]t the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces - the payment of damages, or some specific performance, or the termination of some conduct." 482 U.S. at 761.

This Court most recently examined *Farrar* in *Friends of the Earth, Inc., v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 120 S.Ct. 693 (2000). This Court emphatically stated that *Farrar* "involved no catalytic effect." *Id.* at __, 120 S.Ct. at 711. This Court further explained that a majority of Courts of Appeals had similarly considered the issue and they had reached the same conclusion (*Id.* at __, 120 S.Ct. at 711):

> Recognizing that the issue was not presented for this Court's decision in *Farrar*, several Courts of Appeals have expressly concluded that *Farrar* did not repudiate the catalyst theory. See *Marbley v. Bane*, 57 F. 3d 224, 234 (CA2 1995); *Baumgartner v. Harrisburg Housing Authority*, 21 F. 3d 541, 546-550 (CA3 1994); *Zinn v. Shalala*, 35 F. 3d 273, 276 (CA7 1994); *Little Rock School Dist. v. Pulaski County Special Sch. Dist., #1*, 17 F.3d 260, 263, n.2 (CA8 1994); *Kilgour v. Pasadena*, 53 F. 3d

> 1007, 1010 (CA9 1995); *Beard v. Teska*, 31 F. 3d 942, 951-952 (CA10 1994); *Morris v. West Palm Beach*, 194 F.3d 1203, 1207 (CA11 1999). Other Courts of Appeals have likewise continued to apply the catalyst theory notwithstanding *Farrar*. *Paris v. United States Dept. of Housing and Urban Development*, 988 F. 2d 236, 238 (CA1 1993); *Citizens Against Tax Waste v. Westerville City School*, 985 F. 2d 255, 257 (CA6 1993).

This Court ultimately decided that it was premature for it to decide whether attorney's fees could be awarded under the catalyst theory because it "is for the District Court, not this Court, to address in the first instance any request for reimbursement of costs, including fees." *Id.* at __, 120 S.Ct. at 712.

The Plaintiffs in this action properly moved for their attorney's fees under the catalyst theory in the district court. They were denied on grounds that such relief is never available. This Court should examine the statutes, congressional intent, prior decisions of this Court and determine that a civil rights plaintiff, whose lawsuit catalyzes the defendant to make changes consistent with the relief requested by the plaintiff, is a prevailing party entitled to attorney's fees under the catalyst theory.

III. COURTS OF APPEALS HAVE CONTINUED TO APPLY THE CATALYST THEORY IN CIVIL RIGHTS CASES.

A. Courts of Appeals have uniformly followed the catalyst theory for over thirty years.

Since 1970, numerous courts have relied upon *Parham* and this Court's explanation of the term "prevailing party" to award attorney's fees to plaintiffs in a wide variety of civil rights cases under the catalyst theory. *E.g., Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978);[13] *N.A.A.C.P. v. Wilmington Medical Center, Inc.*, 689 F.2d 1161 (3rd Cir. 1982); *Bonnes v. Long*, 599 F.2d 1316 (4th Cir. 1979); *Citizens Coalition for Block Grant Compliance, Inc. v. City of Euclid*,

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[13] *Nadeau* is one of the leading decisions under the catalyst theory. *See* Vol. 2, § 2.11, M. Schwartz & J. Kirlin, Section 1983 Litigation, Statutory Attorney's Fees (3rd. ed. 1997). In *Nadeau*, the Court of Appeals adopted a two part test for the catalyst theory. First, *as a matter of fact*, were "the plaintiffs' suit and their attorney's efforts • • • a necessary and important factor in achieving the improvements."581 F.2d at 281. Second, *as a matter of law*, were the plaintiffs' claims not "frivolous, unreasonable, or groundless" under *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 422 (1978). *Id.*

This Court has cited *Nadeau* and relied upon it in numerous decisions. *E.g., Farrar v. Hobby*, 506 U.S. 103, 109 (1992); *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 789 (1989); *Hensley v. Eckhert*, 461 U.S. 424, 433 (1983); *Long v. Bonnes*, 455 U.S. 961, 966-67 (1982)(Chief Justice Rehnquist and Justice O'Connor, dissenting from denial of certiorari); *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980).

717 F.2d 964 (6th Cir. 1983); *Sablan v. Department of Finance, of the Commonwealth of the Northern Mariana Islands*, 856 F.2d 1317 (9th Cir. 1988); *Gurule v. Wilson*, 635 F.2d 782 (10th Cir. 1980).

These courts have generally recognized that it was consistent with congressional intent to award attorney's fees to a civil rights plaintiff whose lawsuit catalyzed the defendant into making changes consistent with the relief requested by the plaintiff, even though the case did not proceed to judgment because it became moot. This application of the term "prevailing party" continued unabated until this Court decided *Farrar v. Hobby*, 506 U.S. 103 (1992), and the Fourth Circuit determined that the catalyst theory was no longer a viable basis for an award of attorney's fees.

B. The Fourth Circuit erroneously determined that it could no longer consider the catalyst theory after *Farrar*.

After *Farrar*, a panel of the Fourth Circuit confronted an application for attorney's fees under the catalyst theory in *S-1 and S-2 v. State Board of Education*, 6 F.3d 160 (4th Cir. 1993). The majority concluded that this Court's decision in *Farrar* had not intended to reverse the long standing and important catalyst theory without addressing it "head-on." *Id.* at 166. It also discussed the other Supreme Court decisions that were consistent with the catalyst theory: *Hanrahan v. Hampton, supra; Hensley v. Eckerhart, supra; Kentucky v. Graham,* 473

U.S. 159, 165 n. 9 (1985); *Hewitt v. Helms, supra*. Finally, the majority acknowledged that other Courts of Appeals had continued to allow attorney's fees under the catalyst theory after *Farrar*. *E.g., Paris v. United States Dept. of Housing & Urban Development*, 988 F.2d 236 (1st Cir. 1993); *Citizens Against Tax Waste v. Westerville City School*, 985 F.2d 255 (6th Cir. 1993); *Craig v. Gregg County, Texas*, 988 F.2d 18 (5th Cir. 1993).

However, Chief Judge Wilkinson dissented from the majority's opinion, stating that "[t]here is no way, however, that *Farrar* and a broad 'catalyst theory' of attorneys' fees recovery can be reconciled." *Id.* at 168-69. His opinion was based upon his belief that this Court, in *Farrar,* intended to limit the term "prevailing party" exclusively to those who obtained an enforceable judgment, settlement or consent decree. He further articulated four reasons why no court should continue to recognize the catalyst theory. First, the theory conflicts with the plain language of § 1988. Second, the theory is in conflict with prior decisions of this Court. Third, the theory engenders confusion and unnecessary litigation. Fourth, the theory makes officials unwilling to take voluntary action and encourages frivolous litigation. *Id.* at 170-75.

Chief Judge Wilkinson's dissent was ultimately adopted as a *per curiam en banc* decision, *S-1 and S-2 v. State Board of Education*, 21 F.3d 49, 51 (4th Cir.) (*en banc*), *cert. denied*, 513 U.S. 876 (1994), by a seven to six vote.

The decision in *S-1 and S-2* is inconsistent with this Court's and other Courts of Appeals' decisions under the catalyst theory for the following reasons. First, § 1988 uses the term "prevailing party" and Congress recognized that "parties may be considered to have prevailed when they vindicate rights through a consent judgment *or without formally obtaining relief.*" S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976) (emphasis added). Second, as discussed in this brief, this Court's prior decisions in *Hewitt, Hanrahan,* and *Hensley, supra,* allow the catalyst theory. Third, other Courts of Appeals have not had any problem applying the catalyst theory as they have recognized that the district courts are equipped with "factfinding expertise" to resolve the factual and legal issues that arise under the catalyst theory. *Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541, 548 (3d Cir. 1994); *Nadeau,* 581 F.2d at 281. The Third Circuit best articulated this view (21 F.3d at 548):

> [The defendant] argues that abrogation of the 'catalyst theory' will eliminate the additional litigation that may be created by the determination of whether a lawsuit was the actual 'catalyst.' However, the factual question is present in any determination of attorney's fees; while it may differ to some extent in a 'catalyst' case, that is merely a question of degree and one which the district courts, in their factfinding expertise, deal with on a regular basis.

Finally, the argument that the catalyst theory would be a disincentive to public officials to act is flawed, because it is even arguably true only with respect to non-meritorious cases where a final judgment would be for the defendant. By contrast, in meritorious cases, public officials will reduce their liability for fees by acting to moot the case, as continued litigation would only increase fees to which the plaintiff will ultimately be entitled. Thus, as the First Circuit observed in the related context of settlement, "the argument cuts both ways . . . We cannot decide this issue based on such honest but speculative concerns." *Nadeau*, 581 F.2d at 282.

From a policy perspective, if the Fourth Circuit's rule precluding the catalyst theory is allowed to stand, it will assure that fewer civil rights lawsuits will be brought. Lawyers will be more unwilling to take on expensive litigation, knowing that they can be deprived of their fees by the defendant's surrender on the eve of victory. Such a result would be contrary to Congress's intent to provide a means for ordinary citizens to privately enforce civil rights statutes.

C. All other Courts of Appeals have continued to follow the catalyst theory after *Farrar*.

All of the other Courts of Appeals that have examined *Farrar* and the continuing viability of the catalyst theory uniformly concluded that civil rights litigants may still recover their attorney's fees under that theory. *State of New Hampshire v. Adams*, 159 F.3d 680, 685 (1st Cir. 1998); *Marbley v. Bane*,

57 F.3d 224 (2nd Cir. 1994); *Baumgartner, supra,* at 545-550; *Craig, supra,* at 21; *Payne v. Board of Education, Cleveland City Schools*, 88 F.3d 392, 397 (6th Cir. 1996); *Zinn by Blankenship v. Shalala*, 35 F.3d 273, 274 (7th Cir. 1994); *Little Rock School District v. Special School District 1*, 17 F.3d 260, 262-263 (8th Cir. 1994); *Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995); *American Council of the Blind v. Romer*, 992 F.2d 249, 250-251 (10th Cir.), *cert. denied*, 510 U.S. 864, 114 S.Ct. 184 (1993); *Cullens v. Georgia. Department of Transportation*, 29 F.3d 1489, 1494-1495 (11th Cir. 1994); and, *Maduka v. Meissner*, 114 F.3d 1240, 1241 (D.C. Cir. 1997) (*per curiam*).[14]

Those Courts of Appeals that have carefully considered the *Farrar* decision have refused to extend its holding to preclude an award of attorney's fees under the catalyst theory for the following reasons. First, the theory was "settled law" and this Court would not overrule a well established rule *sub silenteo*. *Baumgartner* and *Zinn, supra*. Second, *Farrar* involved a plaintiff seeking substantial money damages who only received nominal damages, not a plaintiff seeking

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[14] This Court in *Friends of the Earth, Inc., supra,* cited most of these Court of Appeals decisions to demonstrate that nothing in *Farrar* repudiated the catalyst theory. Also, in *Friends of the Earth*, the United States filed a brief in support of the Petitioners arguments for attorney's fees under the catalyst theory arguing that nothing in *Farrar* "repudiates the reasoning in *Hewitt* and *Maher*." Brief of the United States as Amicus Curiae Supporting Petitioners (U.S. No. 98-822) (filed May 17, 1999).

declaratory or injunctive relief whose action is rendered moot by the defendant's catalyzed conduct. *Marbley* and *Baumgartner, supra*. Third, *Farrar* involved a plaintiff who received a judgment on the merits, thus no issue related to the catalyst theory arose in that case. *Kilgour, supra*.

Further, several Courts of Appeals have specifically rejected the Fourth Circuit's reasoning in *S-1 and S-2*, concluding that the Fourth Circuit misread or misinterpreted *Farrar*. *E.g., Brown v. Local 58, International Brotherhood of Electrical Workers*, 76 F.3d 762, 772 n. 7 (6th Cir. 1996) (Fourth Circuit's reading of *Farrar* has been rejected by other circuits that have considered the issue); *Zinn, supra*, at 274 n. 4 (*Hewitt v. Helms* does allow the award of attorney's fees under the catalyst theory and *Farrar* does not provide otherwise); *Kilgour, supra,* at 1010 (*Farrar* not applicable because it involved recovery on the merits and the catalyst theory is an alternative theory); *Beard v. Teska*, 31 F.3d 942, 951 (10th Cir. 1994) (All the other circuits that have considered the issue continue to follow the catalyst theory).

The Second Circuit, in *Marbley, supra*, considered the issue of attorney's fees after *Farrar* and recognized the public policy behind awarding attorney's fees in civil rights cases as "an incentive for lawyers to accept these often time-consuming cases; limiting that recovery to 'prevailing parties' tends to filter out meritless cases." 57 F.3d at 233. The Second Circuit went on to conclude that the catalyst theory should still be followed as consistent with this Court's prevailing party

analysis, particularly the "generous formulation" standard in *Hensley, supra,* 461 U.S. at 433. It held that nothing in *Farrar* invalidated the catalyst theory because this Court's discussion of judgment or settlement (57 F.3d at 234):

> appears in the segment of the opinion that discusses the particular award in that case: a jury verdict resulting in a final judgment of nominal damages. Earlier in the opinion, the Court noted its "'generous formulation'" under which "'Petitioners may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which obtains some of the benefit the parties sought in bringing suit.'" *Id.* at ___, 113 S.Ct. at 572 (citation omitted). Consistent with this principle, most courts have - either expressly or implicitly - affirmed the continued viability of the 'catalyst' theory of recovery of attorney's fees.

The Eleventh Circuit in *Morris v. City of West Palm Beach*, 194 F.3d 1203, 1207 (11th Cir. 1999), also set forth reasons for the continuing viability of the catalyst theory after *Farrar*:

> While no Supreme Court case has ever affirmatively upheld the application of the catalyst test, the catalyst test accords well with

long-held notions of prevailing parties. *See Hewitt v. Helms*, 482 U.S. 755, 760- 61, 107 S.Ct. 2672, 2676, 96 L.Ed.2d 654 (1987). * * * Additionally, the question before the Court in *Farrar* addressed the *degree* of relief, rather than the *form* of relief, for the plaintiffs in *Farrar* had attained an enforceable judgment of nominal damages. 506 U.S. at 107, 113 S.Ct. at 570. The fact that the majority used broad language in discussing the question before it (i.e., whether an enforceable judgment of nominal damages can justify a fee award under § 1988) does not indicate how it would rule on the question of whether a showing that a plaintiff's lawsuit caused the defendant to act to remedy unconstitutional behavior can justify a fee award. *See Marbley*, 57 F.3d at 234; *Baumgartner*, 21 F.3d at 547-48.

The Eleventh Circuit went on to conclude that the catalyst theory "creates incentives for plaintiffs to initiate potentially meritorious civil rights cases" and therefore, "given the long history and the important policies undergirding the catalyst test," *Farrar* should not be read to eliminate the catalyst theory. *Id.*

This Court should now resolve the dispute between the Fourth Circuit and the rest of the nation regarding the contours of the term "prevailing party." This Court should hold that a

civil rights plaintiff should be awarded attorney's fees when its lawsuit catalyzes the defendant into making changes consistent with the relief requested by the plaintiff, even if the defendant's actions render the underlying case moot. This interpretation of the term prevailing party is consistent with congressional intent in enacting the statutes and encouraging private enforcement of civil rights laws.

IV. THE PLAINTIFFS IN THIS CASE ARE ENTITLED TO A REMAND SO THAT THE DISTRICT COURT CAN CONSIDER THEIR REQUEST FOR ATTORNEY'S FEES UNDER THE CATALYST THEORY.

A. This Court should apply the *Nadeau* test in allowing awards of attorney's fees under the catalyst theory.

If this Court agrees that attorney's fees may be awarded under the catalyst theory, it may want to consider the criteria under which fees should be awarded. The Plaintiffs urge this Court to adopt the *Nadeau* test commonly used by the Courts of Appeals to award attorney's fees in civil rights cases.[15] The

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[15] Chief Justice Rehnquist and Justice O'Connor recognized that the two part test in *Nadeau*, was consistent with the intent of Congress in enacting § 1988 in their dissenting opinion from denial of certiorari in *Long v. Bonnes*, 455 U.S. 961, 966-67 (1982). A majority of Courts of Appeals have employed a two part test under *Nadeau*. *See, e.g., Williams v. Hanover Housing Authority,* 113 F.3d 1294, 1299-1300 (1st. Cir. 1997)

first part of that test is fact specific. It involves a determination of whether there was a material alteration of the legal relationship between the parties and whether there was a causal relationship between the civil action filed by the plaintiffs and the action of the defendants. In examining this first factor, the Court of Appeals in *Nadeau*, 581 F.2d at 275, stated:

> we consider the chronological sequence of events to be an important, although clearly not definitive factor, in determining whether or not defendant can be reasonably inferred to have guided his actions in response to plaintiff's lawsuit. This is particularly true where the evidence relevant to the causes of defendant's behavior is under defendant's control and not easily available to plaintiff.

(attorney's fees allowed under § 1988 and the two part *Nadeau* catalyst test since party caused HUD to change interpretation of law pertaining to portability policy); *Owner-Operator Independent Drivers Association, Inc. v. Bissell*, 210 F.3d 595 (6th Cir. 2000) (attorney's fees allowed under § 1988 and the two part *Nadeau* catalyst test since the party caused that state to abolish the PSC and the Commissioner to resign); *Doty v. County of Lassen*, 37 F.3d 540 (9th Cir. 1994) (attorney's fees allowed under § 1988 and the two part *Nadeau* catalyst test since party obtain preliminary injunction and caused certain prison reforms), *see also* Vol. 2, § 2.11, M. Schwartz & J. Kirlin, Section 1983 Litigation, Statutory Attorney's Fees, (3rd. ed. 1997). Some have broken *Nadeau*'s test into three parts. *See, Morris v. City of West Palm Beach, supra* (Eleventh Circuit applies a three part test to award attorneys fees under the catalyst theory).

The second part of that test is legal. It involves an examination of whether the claim was "frivolous, unreasonable or groundless." 581 at 281. In *Doty v. County of Lassen*, 37 F.3d 540, 548 (9th Cir. 1994), the Ninth Circuit discussed this second factor of the catalyst test, stating:

> Defendants contend that the second element of the * * * test requires the District Court to determine whether the relief was "required by the Constitution or federal law." Defendants are incorrect. The District Court correctly held that the * * * test requires only that the relief be related to a claim that is not frivolous, unreasonable or groundless. * * * This test sensibly keeps the District Court from having to address, during the attorney's fees litigation, the merits of resolved disputes to determine whether the relief obtained would have been obtainable by judgment. [citations omitted].

This Court should consider and adopt the *Nadeau* test. District Courts have applied the *Nadeau* test for over twenty years and they have substantial expertise in making the necessary factfinding in consideration of any fee request under the catalyst theory. The test is also consistent with the statutes and congressional intent regarding when a party may be considered a prevailing party. And by applying the second part of the *Nadeau* test, this Court can ensure that a request for fees

does not require an after-the-fact examination of the merits of the underlying dispute.

B. Plaintiffs Are Entitled to a Remand.

This Court, in its recent decision in *Friends of the Earth, Inc., supra*, states that it "is for the District Court, not this Court, to address in the first instance any request for reimbursement of costs, including fees."528 U.S. __, 120 S.Ct. at 712. In this case, the Plaintiffs presented their request for fees to the District Court based upon the facts set forth above and it was denied solely because of the Fourth Circuit's decision in *S-1 and S-2*. This Court should now reverse that decision and allow the Plaintiffs to proceed with their fee request in the district court.

This Court granted certiorari solely on the general question whether the catalyst theory is an appropriate basis for recovering attorney's fees under federal fee-shifting statutes. *See* Petition at i. In our judgment, if the Court upholds the catalyst theory, it should not go beyond that question and answer a subsidiary question that is *not* presented: whether, under the particular facts of this case, Plaintiffs' lawsuit was in fact a catalyst for the relief that they obtained. To be sure, the District Court said that Plaintiffs "might prevail on this theory," Pet. App. A17, and the chronology of events certainly points in

that direction.[16] But the causation inquiry is highly idiosyncratic and fact-bound, and thus one that should be addressed by the District Court in the first instance. Similarly, it would be unwise for the Court to engage in such an inquiry, because the result would not provide lower courts with much, if any, guidance for other cases that necessarily turn on their own facts and peculiarities.

The fact that Plaintiffs' lawsuit ultimately led to a repeal of the self-preservation rules, through regulatory and legislative action, does not distinguish this case analytically from other catalyst theory cases. Contrary to the arguments of the State Fire Marshal before this Court, several courts have awarded attorney's fees under the catalyst theory even where the relief occurred through legislative action. *E.g., Paris v. United States Dept. of Housing & Urban Development*, 988 F.2d 236 (1st Cir. 1993); *Institutionalized Juveniles v. Secretary of Public*

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[16] The Plaintiffs filed their Complaint in this matter on October 28, 1996, and the Defendants contested the Plaintiffs allegations vigorously. On March 11, 1997, Plaintiffs took the depositions of State Fire Marshal Smittle and Deputy Fire Marshal Darl Cross and each of them asserted that they could not eliminate or modify the self-preservation rule as it was absolutely necessary to protect the elderly in residential care homes, as well the staff and firefighters who serve such residents, from injury by fire. (Stipulation Exhibit 4, Cross Depo. at p. 14, 20-22); (Stipulation Exhibit 5, Smittle Depo. at p. 22-24). In addition, their counsel advised that the State Fire Marshal was definitely unwilling to settle this matter and that it would have to be resolved by the Courts. (¶ 10, Affidavit of Counsel, JA 131). Significantly, a mere six weeks after the depositions and that rebuff of settlement efforts, the State Fire Marshal's Office took steps to eliminate the self-preservation rules.

Welfare, 758 F.2d 897, 917 (3d Cir. 1985); *Owner-Operator Independent Drivers Association, Inc. v. Bissell*, 210 F.3d 595 (6th Cir. 2000). In some cases, it might be difficult to trace the enactment of a legislative or regulatory body to a particular lawsuit. In cases where there is solid evidence that the relevant actors were prompted by the threat of litigation, the inquiry can be quite simple. Thus, although, in general, discerning causation may be more difficult where the action is taken by a multi-member legislative body, rather than regulatory agency, the inquiry remains the same.

In this case, moreover, focusing solely on the actions of the State Fire Marshal and the West Virginia Legislature may well be inappropriate in determining whether Plaintiffs' lawsuit was in fact a catalyst for the relief that they obtained. On October 18, 1996, OHFLAC issued three Cease and Desist Orders that would have left elderly residents such as 102-year-old Plaintiff Dorsey Pierce without a home.(JA 46-55). The Plaintiffs sought a temporary restraining order to enjoin enforcement of the Cease and Desist Orders. The restraining order was effectively granted, when the District Court entered an Agreed Order, under which the Defendants pledged not to enforce the Cease and Desist Orders pending resolution of the validity of the self-preservation rules.

That Agreed Order remained in effect for the entire suit, until the District Court dismissed the case as moot after the West Virginia Legislature approved the Fire Marshal's request to repeal the self-preservation rules and enacted a provision

deleting OHFLAC's self-preservation rules. That being the case, on remand, the Plaintiffs can argue that the focus of the catalyst inquiry should be on the fact that the lawsuit prevented the Defendants from enforcing their Cease and Desist Orders rather than, or in addition to, the enactments of the West Virginia Legislature.

These facts underscore the need for further proceedings below on the question of whether Plaintiffs' lawsuit was a catalyst for the relief obtained. More fundamentally, these facts underscore the error of the Fourth Circuit's no-catalyst rule, which improperly denies attorney's fees to plaintiffs who have fully vindicated their rights under federal law.

CONCLUSION

Based upon the foregoing, this Court should hold that a party prevails when its lawsuit catalyzes the defendant into making changes consistent with the relief requested, even though the lawsuit does not proceed to judgment because it is rendered moot by the defendant's action. This Court should remand this case to the district court to consider the Plaintiffs' request for attorney's fees.

Respectfully submitted,

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